(1)

NO. 88-92

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM,19_____

FIKRY KHALIL,

Appellant,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY-NEW JERSEY MEDICAL SCHOOL,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FIKRY KHALIL
2 SPRING STREET
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(201)434-0811

QUESTIONS PRESENTED FOR REVIEW

1.Was plaintiff deprived of any property rights without due process in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983?

2.Was plaintiff's Title VII action barred by the statute of limitations?

3.Was plaintiff subjected to discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964,as amended,42 U.S.C. Section 2000e-5?

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Prayer

Petitioner Fikry Khalil respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinions of the United States District Court for the District of New Jersey appear in Appendices A&B.

The Judgment of the United States Court of Appeals for the Third Circuit affirming without opinion the judgment of the United States District Court for the District of New Jersey appears in Appendix C . The Order of the United States Court of Appeals for the Third Circuit denying a Petition for Rehearing by the panel and the Court in banc appears in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254. The Petition for Rehearing by the panel and the Court in banc was denied February 26, 1988. This Petition is filed within 90 days of that order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ..... nor shall any state deprive any person of life, liberty,or property, without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Acts of 1964,42 U.S.C. Section 2000e-2000e-17 (1976). Section 703 (a), 42 U.S.C. Section 2000e-2(a) provides in pertinent part:

> It shall be unlawful employment practice for an employer- (1)to fail or refuse to hire or or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,conditions,or privileges of employment, because of such individual 's race, color, religion, sex, or national origin. .....

STATEMENT OF THE CASE

In 1977, plaintiff was appointed as a tenured track Assistant Professor of Radiology at the University of Medicine and Dentistry of New Jersey ("UMDNJ") under a four year contract. In 1981, plaintiff was unanimously reappointed as a tenured track Assistant Professor of Radiology at UMDNJ for an additional three years. In June 22, 1983, plaintiff was notified by the Dean that his employment would terminate on June 30, 1984. In December 15 , 1983, plaintiff became totally disabled and this disability continued throught June 30 , 1984.

In January, 1984, plaintiff submitted his credentials for consideration for promotion to Associate Professor with tenure. In March 22,1984, plaintiff was informed that the Faculty Committe on Appointments and Promotions

("the FCAP") did not recommend him for promotion. In June 22,1984, plaintiff was notified by the Board of Trustees that his employment would terminate on June 30 1984.

In January 4 ,1985, plaintiff filed a complaint with the Equal Employment Opportunity Commision (EEOC) alleging that the University 's failure to promote him was due to his Egyptian national origin. In March 20,1985, plaintiff filed a complaint with the New Jersey Division of Civil Rights alleging discrimination based on national origin. In January 17,1986, the EEOCissued plaintiff a Notice of Right to Sue, plaintiff then filed this action on March March 25,1986 alleging a violation of Title VII of the Civil Rights Act of 1964 as amended,42 U,S.C. Section 2000e-5. In November 30,1986, plaintiff was

permitted to ammend his complaint to allege additional claim under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and under 42 Section 1983.

In April 13, 1987, the United States District Court for the District of New Jersey granted defendant 's motion for summary judgment and dismissed that portion of my complaint which dealt with my due process rights. In May 26, 1987, the District Court dismissed my Title VII claim as being barred by the statute of limitations.

Plaintiff appealed from both orders to the United States Court of Appeals for the Third Circuit and his appeals were consolidated on July23,1987. Plaintiff included in his appeals newly discovered evidence. These documents have not been presented to the District Court because they, by due diligence , were not available to plaintiff at the time the

case was in the District Court, or in time to move for a new trial under Rule 59(b). In September 2, 1987 , appellee moved to suppress portions of plaintiff's appendix and for leave to file supplemental appendix.

In February 2, 1988, the United States Court of Appeals for the Third Circuit ordered that appellee's motion to suppress portions of the appendix is GRANTED and that the judgment of the District Court be and is hereby AFFIRMED. Costs taxed against appellant. Appellant filed a petition for rehearing by the panel and the Court in banc. This petition was denied on February 26, 1988.

REASONS FOR GRANTING THE WRIT

POINT I

APPELEE'S MOTION TO SUPPRESS PORTION OF APPENDIX SHOULD NOT BE GRANTED

In representing myself, I submitted newly discovered documents to the United States Court of Appeals for the Third Circuit,to give the Court the opportunity to review all of the pertinent evidence with respect to the issues. These documents have not been presented to the District Court because they, by due diligence , were not available to me at the time the case was in the District Court , or in time to move for a new trial under Rule 59(b). The reason for that is that my chairman left UMDNJ and moved to Morristown Memorial Hospital and needed a long time to go back to UMDNJ and to review his record there and to write his recollec-

tions about his conversations with me. These documents are extremly relevant to the issues which I have raised in my complaint and amended complaint. I believe that these documents firmly support my position that a discriminatory action was undertaken by UMDNJ in my case.

Defendant moved to suppress these documents stating that since the District Court did not see these documents, they should not be considered by the United States Court of Appeals for the Third Circuit. The united States Court of Appeals for the Third Circuit granted- without opinion- the defendant's motion to suppress these documents. As a layman , Idc not quite understand this objection, since I believe that the United States Court of Appeals for the Third Circuit should consider all of the relevant evidence in making its

determination. However, if it is important that the District Court consider these documents in connection with its decision, I would respectfully submit that this Court send my cases back to the District Court for its re-consideration of my complaint in iight of this evidence.

POINT II

UMDNJ VIOLATED MY CONSTITUTIONAL PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

I respectfully submit to this Court some of the newly discovered documents which I referred to in point I, namely : an actual draft of a letter prepared by my departmental chairman , the notes inscribed thereon by the Dean , and the ultimate final draft of the letter written by the chairman. All of these documents have been presented to

the United States Court of Appeals for the Third Circuit. As can be seen from the initial draft prepared by my chairman , he would have stated:

> Dr. Khalil's potential would best be served by a short(one or two year) extension of his present rank to allow fruition of grant requests now in submission and further development of his present research activities. We are prevented from doing this by the rules under which we all function.

As can be noted from the draft , the Dean crossed out the foregoing language of my chairman and suggested in its place the following language:

> I agree with the tenured faculty that Dr. Khalil has thus far shown no significant independant investigative activity.

The question of whether this suggested change came from the Dean is answered by the additional notation that the Dean's memo should be " well hidden " which of course, raises the additional inference that discriminatory remarks prompted

this concern for secrecy. Incredibly enough , the final version of the letter written by my chairman contains the exact language of the Dean including the underscoring of the word independant. Primarily , as a result of the foregoing correspondence and memoranda , I was advised on March 22, 1984 that FCAP did not recommend me for promotion. In fact, when one reviews the correspondence edited by the Dean , it becomes apparent that under appropriate circumstances, I may have received that recommendation but for the discriminatory acts of UMDNJ.

The significance of the foregoing documents is self-evident. Obviously, my chairman was of the opinion that I possessed the requisite capabilities that given a short extension, Iwould hav achieved tenured faculty status. The chairman stated to me in a letter which was submitted to the United States Court of Appeals for the Third

Circuit that he believed that my activated grant and the success of my research would ultimately yield his support for my promotion to the tenured rank of Associate Professor, This sentiment was echoed as recently as July 30, 1987 when the chairman wrote to me about my continual request for consideration for promotion.

The real question here is whether Iwas discriminated against in my pusuit of a tenured track position . I respectfully submit that I have been. Certainly, I should have at least been given the opportunity to explore by way of discovery what my departmental chairman meant by his initial efforts in my behalf with respect to the FCAP application. More importantly , what was the basis for the Dean's editing of that recommendation ? Given the fact that I

was obviously pursuing a successful track towards a tenured position , and further that since being denied this position that UMDNJ has seen fit to retain me as a member of the faculty so that I can pursue my research under the National Institute of Health grant , the question is not whether I had a constitutional right to an additional six month period- as addressed by the District Court- but rather the question is wether my race and/or physical incapacity constituted the basis for what appears to be a patently arbitrary decision.

More to the point is the decision of the Court in Cohen vs. Board of Trustees , Docket No. 85-3841 (D.N.J. June 27,1986). As in Cohen , it was made clear to me by my departmental chairman , and it would have been made clear if his written recommendation had

not been edited , that I would have been successful in my efforts to achieve tenured status had I been given additional time within which to demonstrate my research skills and my published reports.

Put another way , all of the evidence with respect to my career at UMDNJ pointed towards a tenured position and other than the conclusory and factually unsupported remarks of the Dean , there is no credible evidence to the contrary. Under these circumstances, it is clear that the decision of UMDNJ was arbitrary , capricious and based upon discriminatory grounds . This is particularly so when additional time could readily been granted by permitting me to go into adjunct status during the seven year probationary term as is set forth in Ms. Davenport's memo. Thus, having been denied an opportunity to

obtain tenured status , I would submit that I have been constitutionally deprived of my rights of procedural and substantive due process.

I have also been constitutionally deprived of my rights of procedural and substantive due process when the Dean in 1985- when I was an adjunct Assistant Professor- refused to transmit my credentials to FCAP for consideration for promotion. The District Court noted that while in three other instances such credentials had been transmitted by the Dean to FCAP , those three individuals while serving in an adjunct capacity had received the recommendation of their departmental chairman. It is important to note however that the recommendation of the departmental chairman is not a prerequisite for reconsideration .
I point to the testimony which took place

in my arbitration proceeding wherein the Dean admitted that such a recommendation was not required. Thus , the assertion that I lacked the recommendation of my departmental chairman is nothing more than a straw man created by UMDNJ since such a recommendation is not required.

In addition, the District Court, in reaching its decision in the April 13 , 1987 opinion, relied upon the case of Board of Regents vs. Roth , 408 U.S. at 578. I would submit that the application of Roth to the foregoing fact facts of my case is inappropriate. Roth was hired for one year and one year only. The fact that he was not rehired or reappointed therefore has no bearing whatsoever on the facts of my case. In my case, I was hired initially for a four year period and then reappointed to a three year term. In the whole seven year

period, I was not a tenured faculty member by virtue of the contract. However I was on a tenured track position pointing towards tenured status. The entire seven year process was designed to put me in a position of being promoted to a tenured position. This was not a one year contract without reappointment. Therefore , to apply Roth to the facts of my case is simply inappropriate.

I therefore respectfully submit that for all of the foregoing reasons , I have been constitutionally deprived of my rights of procedural and substantive due process and the District Court committed an error in dismissing my case. Also , The United States Court of Appeals for the Third Circuit committed an error in affirming the District Court's judgment.

POINT III

THE COMPLAINT UNDER TITLE VII IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

In June 22, 1983 , I received the following letter from the Dean :

June 22,1983

Dear Dr. Khalil

Your appointment as Assistant Professor in the Department of Radiology at the University of Medicine and Dentistry of New Jersey New Jersey Medical School expires on June 30,1984. I have received notification from your departmental chairman that he is not recommending renewal of your appointment. In accordance with the Bylaws of the University, I am officially informing you that your appointment as Assistant Professor will not be renewed and your employment at the University will terminate effective June 30 ,1984.

Thank you for your contributions to the New Jersey Medical School, and I wish you well in your future endeavors.

Sincerely

Vincent P.Lanzoni,M.D.,Ph.D

This letter only informed me that my appointment as an ASSISTANT PROFESSOR will not be renewed , it DID NOT preclude that

I can submit my name for promotion to the tenured rank of Associate Professor as outlined in itemIISection G of the Guidelines and procedures for appointment or promotion to the UMDNJ-New Jersey Medical School Faculty:

> If a faculty member has not been recommended for promotion within the times stated in the table below, his/her name may be submitted at his/her request,by the department chairperson to the Dean for review in accordance with normal procedures as outlined in Item II , Section A above.
>
> | | |
> |---|---|
> | Instructer | 3 years |
> | Assistant Professor | 6 years |
> | Associate Professor | 7 years |

In addition,the Dean's letter of June 22, 1983 DID NOT communicate any tenure decision to me. THE FIRST TIME a tenure decision was communicated to me was in MARCH 22 ,1984 when the FCAP informed me that they did not recommend my promotion to the tenured rank of Associate Professor.

In the May 26 ,1987 Opinion, the District Court ruled that the statute

of limitations, in my case , began to run from June 22 ,1983 , the date of the letter of the Dean.

The District Court cited the case of Delaware State College vs. Ricks,449 U.S, 250 (1980) for the proposition that my pursuing of several remedies-such as submitting my credentials for consideration for promotion- did not toll the running of the statute of limitations.

I would respectfully submit that this must be a misapplication of that decision to me. Certainly , no prejudice has befallen UMDNJ as a result of my timely efforts to pursue my rights.

More to the point and this is the second issue which I believe demonstrates the incorrectness of the District Court's decision , UNLIKE the employee in Ricks, the June 22, 1983 letter of the Dean DID NOT communicate a tenure decision to me , as was found by the District Court.

This holding by the District Court is predicated upon an erroneous view of UMDNJ's bylaws. As has been noted , once I received the letter from the Dean , I immediately submitted my own credentials to the FCAP for consideration for promotion to the tenured rank of Associate Professor. The FCAP constitutes an independant avenue toward a tenured status. Thus, while I could have achieved tenured status simply by virtue of action by my departmental chairman , the Dean, the FCAP and ultimately the Board of Trustees , a completely independant avenue which was available to me consisted of the FCAP. If in fact FCAP had approved my credentials and recommended promotion to an Associate Professor , this action would then have been taken to the Board of Trustees for an ultimate decision.

Thus , there were two procedural

courses available to me with respect to my promotion. Under these circumstances , to point to only one of these avenues being foreclosed and to utilize the date of the notice of that information as the basis for the commencement of the running of the statute of limitations must be incorrect. To rule otherwise would render empty my alternative avenue of pursuing my rights before the FCAP. Certainly , this was not the intent of the bylaws of UMDNJ and it was pursuant to these rights that I sought relief before the FCAP prior to filing my complaint.

I therefore respectfully submit that for all of the foregoing reasons , my complaint under Title VII should not be dismissed as being barred by the statute of limitations.

CONCLUSION

For the above-stated reasons , and on the basis of the authorities cited , this Court should reverse the actions of the District Court and the United States Court of Appeals for the Third Circuit , and render a decision in this case , or in the alternative, remand the case to the District Court with instructions to consider all of the newly discovered documents presented by the appellant. Appellant prays the Court will grant a writ of certiorari.

(2) 88-92

APPENDIX A

IN THE UNITED STATES DITRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 86-1066

FIKRY KHALIL, M.D.,
Plaintiff,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY-NEW JERSEY MEDICAL SCHOOL,
Defendant.

OPINION

April 13,1987

BEFORE
HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE
(No appearances)

Plaintiff, Fikry Khalil, M.D.,brought this action pro se on March 25,1986 against the University of Medicine and Dentistry of New Jersey ("UMDNJ")-New Jersey Medical School ("NJMS") alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5. On December 1,1986, former Judge Stern, to whom this case was originally assigned ,permitted plaintiff to amend his complaint to allege adue process violation under the Fourteenth Amendment to the United States Constitution and a violation

of 42 U.S.C. Section 1983. The defendant now moves for summary judgment on the grounds that (1) plaintiff has failed to establish the deprivation of any constitutionally protected liberty or property rights, and (2) plaintiff's Section 1983 claim is barred by the Eleventh Amendment to the United States Constitution. Because defendant has moved only as to the Title VII claim, I will treat defendant,'s motion as one for partial summary judgment pursuant to Fed. R.Civ.P. 56(d). Apparently, the defendant previouslymoved for summary judgment on the Title VII claim , but for some reason, there was never any disposition of that motion by Judge Stern. In any event, the only motin presently before me is the one dealing with plaintiff 's Section 1983 claim.

Jurisdiction is predicated

upon 28 U.S.C. Section 1331.

Statement of facts and Procedural Background

The facts are not in dispute. In August 1971 , plaintiff began his employment with the UMDNJ-NJMS as a post doctoral fellow. In 1974 he became an Instructor of Radiology . Then in 1975 plaintiff took a two-year unpaid leave of absence to teach at the University of Petroleum and Minerals in Saudi Arabia .

In 1977 plaintiff returned to the UMDNJ-NJMS and assumed the positio n of Assistant Professor of Radiology , without tenure , under a four-year contract . In 1978, he suffered a heart attack and in 1979 underwent open heart surgery . Plaintiff was subsequently reappointed as an Assistant Professor , without tenure , for an additional term

of three years, which was to expire in June of 1984.

On March 4, 1983, pursuant to the University Bylaws requiring that notification of non-renewal be given 12 months prior to the expiration of a three-year term, Dr, Vincent Lanzoni, Dean of the NJMS, inquired of Dr, Gilbert Melnick, Chairman of the Radiology Department, what action was recommended for plaintiff. See Affidavit of Katherine Suga, Esq., Appendix at 1a; Art. V, Title B, Section 3(e) of the University Bylaws, Appendix at 48a. On June 3,1983,Dr,Melnick advised Dean Lanzoni and the plaintiff that neither he nor the tenured members of the department recommended plaintiff for promotion to Associate Professor with tenure.On June 22,1983, plaintiff was officially notified that his employment at the University would terminate on June 30

1984.

In January 1984 plaintiff submitted his credentials for consideration for promotion to Associate Professor with tenure. This submittion was without the support of his department chairman, Dr. Melnick. On March 22,1984, plaintiff was informed in writing that the Faculty Committee on Appointments and promotions (the "FCAP")did not recommend him for promotion.Plaintiff appealed this decision, and on April 17,1984, the FCAP affirmed its decision. That decision was subsequently approved by the Board of Trustees.

On June 26,1984, plaintiff was proposed by his department chairman for a title change to Adjunct Assistant Professor for a one-year term, which he accepted. Plaintiff was subsequently reappointed to this position and remains

an Adjunct Assistant Professor to date.

On June 28,1984, pursuant to the collective bargaining agreement between the University and the Council of Chapters of the American Association of University Professors ("AAUP"), plaintiff filed a grievance challenging the University,s decision not to promote him. He alleged a failure by the University to include in his probationary period his service elsewhere, discrimination based on ethnic origin (Egyptian), age and physical handicap, and a refusal by the FCAP to consider two research papers in evaluating his promotion application. The Committee of Review denied his grievance in April,1985.

On January 4,1985 plaintiff filed a complaint with the Equal Employment Opportunity Commission("EEOC") alleging that the University,s failure to

promote him was due to his Egyptian national origin.

On January 4, 1985, plaintiff submitted his credentials to Dr. Melnick for consideration for promotion from his present position of Adjunct Assistant Professor to Associate Professor with tenure. Dr. Melnick, who did not recommend plaintiff for this promotion, then transmitted those credentials to the Dean.

In response, the Dean advised Dr. Melnick that plaintiff was not eligible for consideration for promotion. He explained that :

> As stated in the current Guide - lines for Appointment or Promotion, an individual who was not promoted prior to the expiration of a tenure track appointment may be given a one-year terminal adjunct appointment.

Affidavit of Katherine Suga, Appendix at 19a (emphasis in original).

On February 21, 1985 plaintiff filed a grievance concerning Dean Lanzoni, s refusal to transmit his application to the FCAP,which was denied by the Committee of Review on April 1 1985. On March 20,1985 plaintiff filed a complaint with the New Jersey Division of Civil Rights alleging discrimination based on national origin.

In April of 1985 the AAUP requested arbitration of plaintiff,s June 1984 and February 1985 grievances, except for the discrimination claim. An arbitration was conducted,at which time the June 1984 grievance was withdrawn. As to the remaining grievance, plaintiff called as a witness Dr. Sheldon Gertner, a former chairman of the FCAP , who testified that he knew of three Adjunct Assistant Professors who had been promoted to the position of Associate Professr . Unlike the plaintiff, all three had the

recommendation of their departmental chairperson. On October 21 , 1985 the Arbitrater ruled that the Dean's refusal to transmit plaintiff's papers to the FCAP in 1985 did not violate written University promotion procedures.

On January 17 , 1986, the EEOC issued plaintiff a Notice of Right to Sue. Plaintiff then filed this action on March 25, 1986.

Discussion

A. Eleventh Amendment Immunity

Plaintiff, who is now represented by counsel. alleges that pursuant to the University's own promotion policy, he was denied proper treatment in the promotion process and as such , was deprived of his liberty and property without due process of law. Defendant maintains , however, that it is immune from suit by virtue of the Eleventh Amendment.

The Eleventh Amendment Immunity of the UMDNJhas been considered on several occasions by members of this court, including myself. See Gena v. College of Medicine & Dentistry No. 83-3832 (D.N.J. February 15,1985) (Debevoise, J.); Maurielle v. University of Medicine & Dentistry, No. 83-1569 (D.N.J. August 10, 1984) (Lacey, J.) ,rev'd on other grounds 781 F.2d 46 (3d Cir.) , cert. denied, 107 S. Ct. 80 (1986); Cohen v. Board of Trustees of the UMDNJ, No. 85-3841(D.N.J. June 27, 1986) (Barry, J.) .In all three cases, it was held that the UMDNJ is not an alter ego of the State and thus not immune from suit under the Eleventh Amendment. See also Fuchilla v. Layman, No. A-3827-84T1 (N,J.App. Div. May 27,1986) (UMDNJ is autonomous and not an alter ego of the State); DeAngelis v. Addonizio,103 N.J. Super. 238, 249-54 (Law Div.1968) (New Jersey College of Medicine and

Dentistry is an independant and autonomous entity) .In the case at bar ,the UMDNJ has not presented any evidence that would justify reconsideration of this question. The basis for holding that the UMDNJ is not immune is fully discussed in these prior decisions and need not be repeated here. I conclude that the defendant's motion for summary judgment on this issue should be denied.

B. Plaintiff's Due Process Claim

1. Alleged Deprivation of a Property Interest

Plaintiff initially appeared to be claiming a deprivation of property based on the UMDNJ's failure to promote him to Associate Professor with tenure. However, in his brief in opposition, plaintiff expressly states that he" is not alleging that he was denied his due process rights because he was not promoted from the rank of Assistant Professor to

the rank of Associate Professor with tenure..." Plaintiff's Brief in Opposition at 1. Rather , plaintiff's claim is "that pursuant to Defendant's own policy he was denied the proper treatment in the promotion process." Id.

The University Bylaws provide that an Assistant Professor may be appointed for an initial term of 4 years and then may be reappointed for an additional term of 3 years. See Affidavit of Katherine Suga, Esq., Appendix at 47a, University Bylaws; Art. V, Title B, Section 1. If an Assistant Professor is promoted from within the rank of Associate Professor, tenure is conferred upon promotion. Id. The authority to promote to Associate Professor lies solely with the Board of Trustees. Id. at 60a, Art. V, Title F, Section 4.1.

Plaintiff states that on December 15 , 1983 he became totally

disabled and that his disability continued through June 30 , 1984 , which is the date on which he was terminated from his position as Assistant Professor. Plaintiff asserts that the University has a procedure which provides that if a faculty member has a catastrophic illness, that period of illness should not be counted as part of the seven-year probationary period. Plaintiff urges that the appropriate procedure is to place the faculty member in the non-tenure track position of Adjunct Professor for a sufficient time period so as to compensate for the gap in employment.

The plaintiff seeks " the opportunity to be placed in the tenure tract (sic) for the additional six months he lost as a result of his illness. " Plaintiff's Brief in Opposition at 1. He maintains that a denial of the

opportunity to complete his seven-year period is in violation of the NJMS Bylaws, more particularly Article III, Title E , Section 2.1. See Bylaws, Plaintiff's Brief in Opposition, Exhibit C, at IIIa.

Plaintiff bases this argument on a memorandum dated February 14 ,1986 from Norma Davenport, Esq., Associate Vice President of the UMDNJ , to Dr. Dennis Quinlan , President, Faculty organization. See Plaintiff's Exhibit A. The memorandum reads as follows:

> You have asked whether there is any accomodation available under the Bylaws for an individual who late in the tenure probationary period suffers a catastrophic illness or injury which creats a gap in employment. Although the Bylaws do not count leaves of absence against the probationary period, the concern you have raised is that in some cases an individual's research may suffer substantially from such a gap, and that the time remaining to the individual in his/her probationary period will be insufficient to allow development of a body of work which would support tenure.
>
> Based on review of the Bylaws and

> discussion with Bob D'Augustine, the Assistant Vice President for academic Affairs who works regularly with the appointments procedures and the Bylaws, it appears that such situations can be dealt with by moving the faculty member to an adjunct title for sufficient time to make up the deficiency caused by the gap and then to recommend promotion with tenure, if warranted under the standards and procedures of the appointments process.
>
> It would appear that no Bylaws amendment is necessary but that the NJMS Guidelines on moving individuals from adjunct to tenure track could be restated to allow for this situation.

Plaintiff's Amended Complaint, Exhibit 3.

The University poses several arguments to rebut plaintiff's claim. First, it asserts that while periods of unpaid sick leave and leaves of absence are not included in computing consecutive years of service, plaintiff never took an unpaid sick leave or leave of absence while an Assistant Professor; thus the University maintains, it properly computed his terms as Assistant Professor. See Affidavit of Katherine Suga, Esq., Appendix at 47a, 110a.

Second, the University points to the Affidavit of Robert D'Augustine, Assistant Vice President for Academic Affairs at the UMDNJ,which states that "(t)he procedure for moving a faculty member voluntarily from a tenure track position during the probationary period to the non-tenure track position is not mandated under the Bylaws of the (UMDNJ and NJMS).Although it is permitted , it is not routinely done." Plaintiff's Brief in Opposition,Exhibit B. Third, the UMDNJ argues that plaintiff never requested that he be moved to an adjunct title prior to the expiration of his appointment as Assistant Professor. Fourth, the University states that its decision to terminate plaintiff was made in June of 1983 , six months prior to the time plaintiff asserts that the probationary period should be tolled. Finally , the University submits that any possible error has been cured by making

plaintiff an adjunct professor: "Had plaintiff demonstrated that he merited tenure, his Chairman would have recommended him, as has been done with other Adjuncts." Defendant's Brief at 16.

Plaintiff asserts, however, that as long as he remains in his non-tenure track adjunct Assistant Professor position, he will never be able to apply for promotion to the rank of Associate Professor with tenure: "Only if the Plaintiff is permitted to go back to his former tenure tract (sic) Assistant Professor position will he be able to apply for a promotion to Associate Professor with tenure." Plaintiff's Brief in Opposition at 2.

The central question, therefore, is whether plaintiff has a constitutional right to placement in the tenure track position as Assistant Professor for an additional six months. In order to

determine whether an alleged deprivation of a property interest constitutes a denial of due process, a two-pronged inquiry must be made: First, whether there is a property interest in the due process sense , and second, what procedural protections must be afforded. Board of Rgents v. Roth, 408U.S.564, 569-70(1972).

The Supreme Court has described the property interest protected by procedural due process as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id. at 577. The Court noted further:

> Property interests, of course, are not created by the Constitution . Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independant source such as ststs law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits....

Id.As indicated by Judge Barry in Cohen v. Board of Trustees.

> It is well established that a state agency is bound by its own regulations, and violation of those regulations that infringes life, liberty,or property is an abuse of due process. Kelly v. Railroad Retirement Board,625F.2d 486(3d Cir.1980)....(T)he UMDNJ Bylaws, the NJMS Bylaws, and the Guidelines are issued under the explicit auspices of statute, N.J.S. 18 A: 64G-6(q). These Bylaws and Guidelines...thus also form a part of (plaintiff's) contract of employment. American Ass'n of Univ.Profs. v. Bloomfield College, 129 N.J. Super. 249(ch. Div.1974),aff'd,136 N.J. Super.442(App.Div.1975).

No.85-3841, slip op. at 28-29.

Upon reviewing the Bylaws, Guidelines and other materials submitted by the parties, I conclude that plaintiff has failed to establish a property interest in an additional six months in the tenure track position as Assistant Professor. The only evidence presented in support of his claim of entitlement is the memorandum from Associate Vice President Davenport,

which simply indicates that " the NJMS Guidelines on moving individuals from adjunct to tenure track could be restated to allow for this situation." Plaintiff's Amended Complaint , Exhibit 3. As the Bylaws and Guidelines presently stand, no procedure has been implemented by the UMDNJ-NJMS. The most that can be said is that the Guidelines may provide, in the future,for the procedure urged by plaintiff but that no such procedure presently exists. Robert D'Augustine, Assistant Vice President for Academic Affairs, has indicated that "(t)he procedure of moving a faculty member voluntarily from a tenure track position during the probationary period to the non-tenure track position is not mandated under the Bylaws.... Although it is permitted, it is not routinely done." Affidavit of Robert D'Augustine,Plaintiff's Brief in Opposition, Exhibit B. While this stat-

ment seems to suggest that this procedure may have been utilized at some point, since it is"permitted",plaintiff has failed to demonstrate that removal to a non-tenure track position is or was an established procedure creating a legitimate claim of entitlment.

Based on this conclusion,I need not address the numerous arguments put forth by the University with respect to this issue. However, several questions still remain.

It is unclear whether plaintiff has abandoned his claim that he has a constitutional right to promotion with tenure, which he originally raised in his Amended Complaint. To the extent that plaintiff has not abandoned this contention, I must conclude that he has no constitutionally protected property interest in being promoted with tenure. The Supreme Court's decision in Board of

Regent v. Roth is directly on point.

Roth was an Assistant Professor hired by Wisconsin State University for a fixed term of one academic year. He completed that term but was not rehired for the succeeding academic year. Under Wisconsin law, the decision whether to rehire a non-tenured teacher was within the discretion of the University. The Court found that there was nothing in Roth's appointment that secured any interest in reemployment or any possible claim of entitlement to reemployment. Nor was there any state statute or

University rule or policy creating such an interest. 408 U.S. at 578.

The same holds true here. As in Roth, there is no state law nor University policy, rule , or guideline that secures or creates a property interest in a tenured position. Plaintiff's assertion of

a property intrest reflects no more than his "abstract need or desire " for tenure. Id. at 577. Unlike the plaintiff in Cohen v. Board of Trustees, plaintiff has failed to establish nor has he even suggested that he was promised tenure or that he was being recommended for promotion with tenure. Hence , plaintiff has no constitutionally protected property interest in appointment to Associate Professor with tenure.

Next, it must be determined whether plaintiff was deprived of any constitutional rights when the Dean failed to submit plaintiff's credentials to the FCAP for consideration in 1985 , while plaintiff was an Adjunct Assistant Professor. The University notes that while the Guidelines allow for the self-submission of one's credentials for promotion, this provision is plainly limited to Instructors, Assistant

Professors or Associate Professors, which are all positions of full academic rank. See Affidavit of Katherine Suga , Esq., Appendix at 90a, NJMS Guidelines, Art.II, Section G. Adjunct Assistant Professor, on the other hand, is a position of qualified academic rank. Id. at 54a, University Bylaws, Art. V, Title F, Section1.2. The Guidelines make no provision for the self-submission of credentials by adjunct professors. This interpretation was upheld by the Arbitrator on October 21 , 1985.

The Arbitrator correctly determined that the Univsrsity did not violate any established procedure or policy when the Dean refused to submit plaintiff's credentials to the FCAP. Nothing in the Guidelines or Bylaws requires that the Dean submit an adjunct professor's credentials to the FCAP. While there have been instances in which

the Dean has submitted an adjunct's credentials to the FCAP, in those instances the applicant had the support and recommendation of his departmental chairperson. Again, as was true with regard to the tenure issue , while plaintiff may have desired that the Dean pass plaintiff's credentials on to the FCAP, he has failed to demonstrate any University rule or policy creating an entitlement to such a procedure, Thus, he had no property interest protected by the Fourteenth Amendment.

2.Alleged Deprivation of a Liberty Interest

In addition to claiming a deprivation of a property interest, plaintiff also claims a deprivation of a liberty interest. The liberty protected by the due process clause of the Fourteenth Amendment encompasses an individual's freedom to work and earn a living.

Bollow v. Federal Reserve Bank of San Francisco,650 F.2d 1093, 1100 (9th Cir. 1981), cert. denied, 455 U.S.948(1982). Liberty interests are implicated when an individual is discharged , or rehire refused, for reasons which are sufficiently "stigmatizing" that they seriously damage his standing in the community or significantly foreclose his freedom to take advantage of other employment opportunities. Board of Regents v. Roth, 408 U.S. at 573-74. Furthermore, the stigmatizing reasons must also be publicly disclosed. Bishop v. Wood, 426 U.S.341 (1976). In Bishop, the Supreme Court rejected a claim that mere dismissal was sufficient to constitute a deprivation of a liberty interest.

> In Board of regents v. Roth,408 U.S.564,72 S. Ct.2701,33L.Ed2d548, we recognized that the non-retention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far

> "to suggest that a person is deprived of "liberty" when he simply is not rehired in one position but remains as free as before to seek another."
> ....This same conclusion applies to the discharge of a public employee when there is no disclosure of the reasons for the discharge.

Id. at 348.

Here , plaintiff has not alleged any public disclosure of the reasons for his failure to receive tenure. Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm good name or reputation. Haimowitz v. University of Nevada, 579 F.2d 526,529 (9th Cir. 1978); Bollow, 650 F.2d at 1101. The embarrassment and reflection on professional competence that usually accompany a denial of tenure and subsequent termination are not sufficient to implicate a liberty interest. Davis v. Oregon State University, 591 F.2d 493,498 (9th Cir. 1979); Board of Regents v. Roth, 408 U.S. at 574 n.13. Hence,

plaintiff has not been the subject of a stigmatizing charge that might seriously damage his standing in his community and thus has stated no claim under Section 1983 based on a violation of a liberty interest.

Conclusion

The defendant's motion for summary judgment on the ground that plaintiff has failed to establish the deprivation of a constitutionally protected property or liberty interest will be granted.

I will sign the order submitted by counsel for defendant, as modified.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 86-1066

FIKRY KHALIL, M.D.,
Plaintiff,

v.
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY-NE
Defendant,

OPINION

May 26 , 1987

BEFORE
HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

(No appearances.)

Plaintiff, Fikry Khalil , M.D., brought this action on March 25 , 1986 against the University of Medicine and Dentistry of New Jersey ("UMDNJ")-- New Jersey Medical School ("NJMS") alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5. Plaintiff was permitted to ammend his complaint to allege an additional claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under

42 U.S.C. Section 1983.In a bench opinion dated April 13 , 1987 , I granted the defendant's motion for summary judgment on plaintiff's constitutional claim. Defendant now moves for summary judgment on plaintiff's Title VII claim. The facts of this case are fully developed in my prior bench opinion and are incorporated here by reference.

Discussion

The defendant sets forth two arguments in support of its summary judgment motion: (1)plaintiff's claim that his employment was terminated for discriminatory reasons is barred by the statute of limitations; and (2) defendant has articulated legitimate, non-discriminatory business reasons for its failure to recommend plaintiff's promotion and to submit plaintiff's credentials for consideration, and plaintiff will be unable

to demonstrate that defendant's reasons are pretextual. I address each claim in turn.

Statute of Limitations

Pursuant to Title VII, 42 U.S.C. Section 2000e-5(e), a charge filed with the Equal Employment Opportunity commission ("EEOC")

> shall be filed within one hundred and eighty days after the alleged unlawful employment practice occured..., except that in a case of an unlawful employment practice with respect to which the person aggreived has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice..., such charge shall be filed by or on behalf of the person aggreived within three hundred days after the alleged unlawful employment practice occured, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier ....

Here, plaintiff filed a charge with the EEOC on January 4, 1985, alleging that he was denied promotion to the tenured position of Associate Professor based on

his ethnic origin, which is Egyptian. On March 20, 1985, he filed a complaint with the New Jersey Division on Civil Rights. Although plaintiff's charge was not "initially instituted" with the State agency but instead, with the EEOC, he is nevertheless entitled to the longer 300-day limitations period. This conclusion is based on applicable case law and federal regulations.

In Mohasco Corp. v. Silver, 447 U.S. 807 (1982), the aggreived party filed his claim with the EEOC 291 days after the alleged discrimination occured. When the claimant filed his complaint with the EEOC no state claim had been filed. However, the EEOC immediately forwarded his letter to the State agency. The Supreme Court applied the 300-day exception to the 180-day rule since the EEOC did not consider the charge but rather, sent it immediately to the state agency, to afford that agency

an opportunity to consider the charge. As the Court concluded , "Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were ' initially instituted with a State ... agency' prior to their official institution with the EEOC. Therefore, respondent came within Section 706(e)'s exception allowing a federal filing more than 180 days after the occurance." Id. at 816-17. In so holding, the Court observed that the purpose behind the extended 300-day period is to give those States having agencies that consider discrimination claims an opportunity to redress the evil at which the federal legislation was aimed. Id. at 821.

As noted in Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 752 n.4 (3d Cir.), cert. denied, 464 U.S. 862 (1983), the EEOC amended its regulations subsequent to the Mohasco decision

to provide :

> Charges arising in jurisdictions having a (state deferral agency) but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt.Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate (state agency).

29 C.F.R. Section 1601.13(a) (3) (1987). As noted in the regulations, this provision was enacted to give full effect to the legislative purpose of Section 2000e-5, that is , to give the state agencies an opportunity to remedy the alleged discrimination prior to federal intervention. Id. Section 1601.13 (a)(4)(i).

In the case at bar,plaintiff resides in a jurisdiction having a state deferral agency under the regulations, i.e., the New Jersey Division on Civil Rights. It is unclear whether the EEOC forwarded plaintiff's charge to the State agency as required by the regulations. However, the EEOC was required to

do so. Hence ,plaintiff is entitled to the longer 300-day limitations period.[1]

The defendant contends, nevertheless, that plaintiff's claim is time-barred even under the longer limitations period. Defendant argues that although plaintiff's last day of employment as an Assistant Professor was June 30, 1984, under rhe rule announced in Delaware State College v. Ricks, 449 U.S. 250 (1980),the alleged discriminatory act occured on June 22,1983, the date plaintiff was officially notified that his employment would terminate on June 30, 1984.

In Ricks, the college's Tenure Committee recommended in February 1974 that a black professor not receive a

1.This case is distinguishable from Kocian, since the regulations were not yet in effect at the time the claimant in that case had filed his claim with the EEOC.707 F.2d at 752. Here, the regulations were in effect at the time plaintiff filed his charge.

tenured position. On March 13, 1974, the College Board of Trustees agreed with this recommendation and voted to deny tenure to Ricks. Ricks immediately filed a grievance with the Board's Grievance Committee. On June 26,1974, during the pendency of the grievance, the College offered Ricks a one year terminal contract that would expire on June 30 ,1975. Pursuant to the College's policy, upon the expiration of a terminal contract, the employment relationship ends. On September 12,1974, Ricks' grievance was denied.

In determining when the limitations period began to run with respect to the denial of tenure , the Supreme Court concluded that the limitations period commenced at the time the tenure decision was made and communicated to Ricks, even though one of the effects of the denial of tenure-- the loss of a teaching position-- did not occur until later. The Court

rejected the argument that the Board's decision in March 1974 to deny tenure did not become final until the Board denied Ricks' grievance, thus making September 12, 1974 the date tenure was denied. The Court found that the Board had made clear to Ricks far before September 12 that it had formally and officially denied him tenure and that "(t)he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Id. at 261.

The defendant urges that these same principles should apply to the case at bar, since the June 22, 1983 letter from the Dean to plaintiff "officially inform(ed)" him, in accordance with the Bylaws, that his employment with the UMDNJ would terminate on June 30, 1984. Defendant's Appendix at 3a. Plaintiff argues, on the other hand, that it was not until he received the Board of Trustees'

letter approving his termination that he became aware of his potential termination. Plaintiff's Brief in Opposition at 2. However, defendant asserts that under the University Bylaws, the final authority to advise of non-renewal of employment rests with the Dean, and the Bylaws do not require final approval by the Board on non-renewals.Defendant's Brief at 12, citing University Bylaws, Art. II, Title B,Sections 1 and 2; Art.II,Title C , Sections 2 and 4; Art. V, Title F, Section 4.1;Art.VI,Title B, Section 1; Art.VII, Title C, Section 8; Art.V, Title B, Section 3. In support of this statement, defendant has submitted the affidavit of Robert D'Augustine , Staff to the Personnel Committee of the Board of Trustees, indicating that the Board's approval is not required for non-renewals. See Affidavit, annexed to plaintiff's

notice of motion for summary judgment. Plaintiff has presented no argument or evidence to refute defendant's assertion.

I conclude that the statute of limitations began to run from June 22,1983 when plaintiff received official notification that his employment was to be terminated. This is the date on which the decision not to promote him to the tenured position of Assistant Professor was made and communicated to him. As noted by the Supreme Court in Ricks.

> We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes....But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned. In NLRB v. Yeshiva University, 444 US 672,677, 63 L Ed2d 115, 100 S.Ct. 856(1980), we noted that university boards of trustees customarily rely on the professional expertise of the tenured faculty, particularly with respect to decisions about hiring, tenure,termination, and promotion. Thus, the action of the Board of Trustees on March 13,1974, affirming the faculty recommenda-

> tion, was entirely predictable. The Board's letter of June 26,1974, simply repeated to Ricks the Board's official position and acknowledged the pendency of the grievance through which Ricks hoped to persuade the Board to change that position.

449 U.S. at 262 n.16.

Moreover, the fact that plaintiff submitted his credentials for reconsideration does not serve to extend the limitations period. Although plaintiff seeks to phrase his complaint as alleging three seperate discriminatory acts-- his termination, the Faculty Committee's refusal in 1984 to recommend his promotion with tenure, and the Dean's refusal in 1985 to submit plaintiff's credentials for reconsideration-- they are all part and parcel of the defendant's decision not to promote him. As stated by the Supreme Court,

> We do not suggest that aspirants for academic tenure should ignore available opportunities to request recosideration. Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws.

Id. at 261 n.15. Furthermore, "(t)he existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." Id. at 261.

It is impotant to note the court's caveat that where more than one act of discrimination is alleged, the general principles discussed in Ricks must be applied on a case-by-case basis. Id. at 257 n.9. Although it might be argued that plaintiff has set forth three separate claims of discrimination, the last occuring in 1985, as already noted, these claims are all based on the defendant's decision not to promote him with tenure and thus to terminate his position as Assistant Professor. Applying the "general principles discussed" in Ricks , I conclude that his claim of discrimination arose on the date he was officially notified that he would not be reappointed

to that position.

Conclusion:

Defendant's motion for summary judgment as to plaintiff's Title VII claim will be granted on the ground that the entire claim is barred by the statute of limitations.

Counsel for defendant is directed to submit a form of order consistent with this decision.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos.87-5309 & 87-5443

FIKRY L. KHALIL,
Appellant

v.

UNIVERSITY OF MEDICINE and
DENTISTRY OF NJ,NJ MEDICAL SCHOOL

Appeal from the United States District Court for the District of New Jersey-Newark.
(D.C. Civil Action No. 86-1066)
District Judge: Hon. Dickinson R. Debevoise.

Submitted Under Third Circuit Rule 12(6)
January 19, 1988
Before: HIGGINBOTHAM, SLOVITER and MARIS, Circuit Judges.

JUDGMENT ORDER

It is ORDERED that Appellee 's motion to suppress portions of the Appendix is GRANTED.

After consideration of all contentions

raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
Sally Mrvos, Clerk

FEB 2,1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5309 and 87-5443

FIKRY L. KHALIL,
Appellant

v.

UNIVESITTY OF MEDICINE and
DENTISTRY OF NJ,NJ MEDICAL SCHOOL

(D.C. Civil No. 86-1066)

SUR PETITION FOR REHEARING

present: GIBBONS, Chief Judge,SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

_____
Circuit Judge

Dated: February 26, 1988

NO. 88-92 (3)

In The

Supreme Court of the United States

OCTOBER TERM, 1987

FIKRY KHALIL,

Petitioner,

-vs-

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, - NEW JERSEY MEDICAL SCHOOL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AND APPENDIX IN OPPOSTION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATUTE CITED

No. 88-92

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1987

FIKRY KHALIL,

Petitioner,

v.

THE UNIVERSITY OF MEDICINE AND
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NEW JERSEY MEDICAL SCHOOL,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF THE CASE

In August 1971, petitioner Fikry Khalil began his employment with respond-

ent University of Medicine and Dentistry of New Jersey - New Jersey Medical School (hereinafter "University" or "UMDNJ" and "NJMS") as a post doctoral fellow (PaA3).* He held that position until 1974 when he became an Instructor of Radiology (PaA3). In 1975, petitioner took a two year unpaid leave of absence and taught in Saudi Arabia (PaA3). Upon his return to UMDNJ-NJMS in 1977, petitioner assumed the position of Assistant Professor of Radiology, without tenure, under a four year contract (PaA3). Petitioner was subsequently reappointed as an Assistant Professor, without tenure, for one additional term of three years or until June 1984 (PaA3-4).

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* PaA refers to Appendix A of petitioner's appendix.

On March 4, 1983, pursuant to a provision in the University Bylaws, Art. V, Title B, § 3(e), which required that notification of non-renewal of petitioner's appointment be given by the Dean of New Jersey Medical School or his designee twelve months prior to the expiration of his three year term, Dr. Vincent Lanzoni, Dean of the New Jersey Medical School, inquired of Dr. Gilbert Melnick, Chairman of the Department of Radiology, what action was recommended for petitioner (PaA4). On June 3, 1983, Dr. Melnick advised Dean Lanzoni and petitioner that neither he nor the tenured members of the department recommended petitioner for promotion to Associate Professor with tenure (PaA4). On June 22, 1983, Dr. Lanzoni officially notified petitioner that his employment

as an Assistant Professor at the University would terminate on June 30, 1984 (PaA4-5).

In January 1984, petitioner submitted himself to the Faculty Committee on Appointments and Promotions (hereinafter "FCAP") for consideration for promotion to the rank of Associate Professor with tenure (PaA5). This submission was without the support of Dr. Melnick (PaA5). On March 22, 1984, petitioner was informed that FCAP did not recommend him for promotion to the tenured rank of Associate Professor (PaA5). Petitioner appealed this decision on April 2 and on April 17, 1984, FCAP affirmed its decision not to recommend petitioner for promotion (PaA5). Petitioner was subsequently advised that the termination of his appointment as

Assistant Professor, effective June 30, 1984, had been approved by the Board of Trustees (PaA5).

On June 26, 1984, petitioner was proposed by his Department Chairman for a title change to Adjunct Assistant Professor for a one year term (PaA5). The Board of Trustees approved the change in title and petitioner accepted this position (PaA5-6). He was subsequently reappointed to the position (PaA5-6). On March 31, 1988, this appointment expired.

On January 4, 1985, petitioner filed a complaint with the Equal Employment Opportunity Commission alleging that the refusal to promote him from Assistant Professor to Associate Professor was because of his national origin (PaA6). Petitioner is Egyptian (PaA6).

On January 8, 1985, by way of a letter to Dr. Melnick, petitioner submitted his credentials for consideration for promotion from Adjunct Assistant Professor to Associate Professor, requesting that Dr. Melnick transmit same to Dean Lanzoni (PaA7). On January 9, 1985, Dr. Melnick transmitted petitioner's promotion papers to the Dean (PaA7). Dr. Melnick did not recommend petitioner for promotion (PaA7).

On January 23, 1985, Dean Lanzoni advised Dr. Melnick and petitioner that petitioner was not eligible for consideration for promotion (PaA7). As an Adjunct, petitioner could not submit himself to FCAP for consideration without the recommendation of his department chairperson (PaA8-9; PaA24-25).

On February 21, 1985, pursuant to the collective bargaining agreement between the University and the Council of Chapters of the American Association of University Professors, petitioner grieved Dean Lanzoni's refusal to transmit his application to FCAP (PaA8).

On August 28, 1985, an arbitration was conducted, at which time a former Chairman of FCAP, Dr. Sheldon Gertner, was called by petitioner (PaA8). He testified that he was aware of three faculty members who had been promoted from the rank of Adjunct Assistant Professor to Associate Professor; however, at the time of their promotions, all three individuals had the support and recommendation of their departmental chairpersons (PaA8-9). Petitioner, in contrast, did

not have the support of Dr. Melnick, his departmental chairman (PaA7-8).

On October 21, 1985, an Opinion and Award was rendered wherein the Arbitrator ruled that the Dean's refusal to transmit petitioner's papers to FCAP in 1985 did not violate applicable written University promotion procedures (PaA9).

On March 25, 1986, petitioner filed a Title VII action in the Federal District Court for the District of New Jersey (PaA9). Subsequently, on December 5, 1986, with leave granted, petitioner amended his complaint to assert claims under the Fourteenth Amendment and 42 U.S.C. § 1983 (PaA1-2).

On January 16, 1987, the University moved for summary judgment and/or dismissal of the 42 U.S.C. § 1983 claims, urging that petitioner had not demon-

strated the deprivation of any rights protected by the Fourteenth Amendment. On March 2, 1987, petitioner, through counsel, opposed the motion. On April 13, 1987, the Honorable Dickinson R. Debevoise, U.S.D.J., granted respondent's motion, agreeing that petitioner had failed to establish deprivations of any constitutionally protected property or liberty interests (PaA1-28).

With respect to petitioner's Title VII claim, respondent had previously sought summary judgment and/or dismissal grounded on the statute of limitations and its articulation of legitimate, non-discriminatory, non-pretextual business reasons. Petitioner's counsel opposed the motion and on May 26, 1987, the District Court found the entire Title

VII action to be untimely and granted respondent's motion (PaB1-14).*

Petitioner appealed from both orders. In connection therewith, petitioner submitted numerous documents which he never presented to the District Court (Pb6-7).** On February 2, 1988, respondent's motion to suppress portions of the appendix was granted and the judgment of the District Court was affirmed by Judgment Order and without opinion (PaC1-2).*** Petitioner's petition for rehearing was denied on February 26, 1988

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* PaB refers to Appendix B of petitioner's appendix.

** Pb refers to petitioner's petition.

*** PaC refers to Appendix C of petitioner's appendix.

(PaD1-2).*

On May 19, 1988, the petitioner sought relief from judgment before the District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, based upon additional documents including those which were suppressed by the Court of Appeals (Ra3-4).** On May 26, 1988, petitioner filed a petition for writ of certiorari to the United States Supreme Court and on or about July 14, 1988, filed the instant appendix.

On June 28, 1988, the District Court denied petitioner's Rule 60(b) motion (Ra23-24) and entered an Order on July 21, 1988 (Ra25-26). With respect to

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* PaD refers to Appendix D of petitioner's appendix.

** Ra refer to respondent's appendix.

petitioner's attack on the disposition of his § 1983 claim, the motion was untimely, having not been brought within one year of entry of judgment (Ra6). As to the Title VII action, the Court concluded that none of the newly submitted documents undermined its dismissal based on the statute of limitations nor provided support for any of petitioner's allegations of national origin discrimination (Ra13; Ra15).

SUMMARY OF ARGUMENT

The writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit is erroneous or conflicts with any holdings of this Court or any other circuit court of appeals. Rather, the judgment order of the Third Circuit properly affirmed the District Court's application of Board of Regents v. Roth, 408 U.S. 564 (1972) in its dismissal of petitioner's claim of a property interest in tenure, consideration for tenure or in an extended probationary period as Assistant Professor. Similarly, the affirmance of the District Court's analysis concerning the commencement of the Title VII statute of limitations was proper and consistent with the holding

of this Court in Delaware State College v. Ricks, 449 U.S. 250 (1980). For these reasons, no bases exist for granting review of the writ of certiorari.

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT THAT PETITIONER HAD FAILED TO ESTABLISH A PROPERTY INTEREST FULLY COMPORTED WITH THIS COURT'S DECISION IN BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1972).

In determining whether an alleged deprivation of a property interest constitutes a denial of due process, this Court has set forth a two pronged inquiry. First, it must be determined whether a property interest exists and second, what procedural protections inure thereto. Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972). The property interest in a benefit which is protected by procedural due process is "more than a unilateral expectation...." Id. at

577. Rather, it is "a legitimate claim of entitlement" created and secured by state law, rule or understanding. Ibid. Application of this analysis to the instant facts demonstrates that the District and Circuit Courts correctly concluded that petitioner had not established a property interest in tenure, consideration for tenure or an extension of his probationary period. Consequently, no bases exist in this regard for the granting of the writ.

The University of Medicine and Dentistry of New Jersey is governed by its Bylaws which provide that an Assistant Professor may be appointed for an initial term of four years and then may be reappointed for one additional term of three years. Art. V, Title B, § 1 (PaA12). If an Assistant Professor is promoted

from within to the rank of Associate Professor, tenure is conferred upon promotion. Art. V, Title B, § 1 (PaA12). Guiding the achievement of promotion and tenure at New Jersey Medical School, which is one of several educational units comprising the University, is a written system embodied in the Guidelines and Procedures for Appointment or Promotion to the UMDNJ-NJMS faculty. However, the authority to confer tenure and to promote to the rank of Assistant Professor or above lies solely with the Board of Trustees. Art. V, Title F, § 4.1 (PaA12).

In the case at bar, petitioner was appointed in 1977 to the rank of Assistant Professor, without tenure, for an initial term of four years. He was subsequently reappointed for one additional

term of three years as allowed by the University Bylaw, or until June 30, 1984. On June 22, 1983, the Dean of NJMS officially notified petitioner that his employment at the University would terminate on June 30, 1984. The Dean's letter of notification was in complete accordance with the University Bylaw as it provided written notice of non-renewal "twelve months prior to the expiration of an appointment longer than two years...." Art. V, Title B, § 3.

As in Board of Regents v. Roth, supra, there is no New Jersey statute which secures for petitioner a property interest in tenure, nor is a legitimate claim of entitlement created by any University or NJMS Bylaw. Petitioner's letter of reappointment to his second term as an Assistant Professor specifi-

cally provided that his employment as such would terminate on June 30, 1984 (PaA4; Da119)* and cannot be construed as securing the requisite legitimate claim of entitlement to tenure. Thus, petitioner's assertion of a property interest reflects nothing more than an "abstract need or desire" and as the District Court concluded, does not amount to a constitutionally protected interest (PaA22-23). The affirmance by the Circuit Court was correct and requires no review by this Court.**

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* Da refers to the supplemental appendix filed by the University with the Circuit Court.

** In his petition, petitioner relies on several documents which were suppressed by the Circuit Court since they were outside the record: the purported draft of the chairman's letter, purported

(Footnote Continued On Following Page)

As additional support for his § 1983 claim, petitioner urges that he should have been moved to an adjunct title for the six month period between December 1983 and June 1984 when he claims he was totally disabled and then returned to the Assistant Professor position for six months. Petitioner claims that this property interest in an additional six months as Assistant Professor is secured by a February 14, 1986 memorandum of Norma Davenport, Esq., Associate Vice-President (PaA14-15). However, the

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(Footnote Continued From Previous Page)

notes and the purported final draft of the chairman's letter. There is simply no basis for reviewing or disturbing that ruling. Moreover, petitioner's Motion for Relief from Judgment as to his § 1983 claims based on these same documents was denied by the District Court on July 21, 1988 as untimely (Ra6; Ra25-26).

unrebutted evidence presented by respondent to the District Court through affidavit established that moving a faculty member voluntarily from a tenure track position during the probationary period to a non-tenure track position is not mandated by the Bylaws of either UMDNJ or NJMS. While it is permitted, it is not routinely done. The Davenport memo merely reflected the permissive, rather than mandatory, nature of a move from tenure track to non-tenure track. Thus, there is no established rule or policy creating a property interest for petitioner in being moved from Assistant Professor to adjunct status and then back again, thereby extending his seven year probationary period. Therefore, affirmance by the Circuit Court of the District

Court's dismissal of this portion of petitioner's claim was proper.

Finally, petitioner contends that, in 1985, the Dean of NJMS violated his due process rights when he refused to transmit petitioner's credentials, while an Adjunct Assistant Professor, to the Faculty Committee on Appointments and Promotions for consideration for promotion to Associate Professor with tenure. Pursuant to the written hierarchical tenure system of the Guidelines, it is the responsibility of the department chairperson to recommend promotions, inter alia, in formal consultation with the tenured faculty of the department, to the Dean. Art. II, Title C, § 4.2 (Da62); Guidelines Art. II, Title A (Da112). The recommendation is then transmitted from the Dean to FCAP,

Faculty Council, the President and the Board of Trustees. Guidelines, Art. II, Title B (13) (Dal14). Included within the Guidelines is a self-submission provision which is designed to eliminate any unfairness at the departmental level which may prevent a faculty member from being recommended for promotion. The provision allows for the submission of one's own credentials to the Dean for transmission to FCAP. Guidelines, Art. II, Title G (Dal16). However, on its face, the provision is applicable only to Instructors, Assistant Professors or Associate Professors, all of which are positions of full academic rank. Art. V, Title F, § 1 (PaA23-24). Adjunct Assistant Professor, on the other hand, is a position of qualified rank, Art V, Title F, § 1.2, and not a position encom-

passed by the self-submission proviso (PaA24). Although the Dean has, in some instances, transmitted adjuncts' credentials to the FCAP, it is because they all had departmental recommendation (PaA24-25). Petitioner, in contrast, did not have such support (PaA7). Therefore, there is nothing in the Bylaws or Guidelines which required the Dean to submit petitioner's credentials, while an adjunct, to FCAP. Nor has petitioner established the existence of a policy whereby an adjunct, lacking departmental support, can self-submit himself to FCAP for review. Consequently, petitioner has failed to demonstrate a claim of entitlement to FCAP consideration for promotion from adjunct to Associate Professor with tenure.

Therefore, the Circuit Court's affirmance of the dismissal of petitioner's § 1983 claims was clearly a correct interpretation of the governing law as enunciated by this Court.

POINT II

NO JUSTIFICATION EXISTS FOR REVIEWING THE AFFIRMANCE BY THE CIRCUIT COURT OF THE DISMISSAL OF PETITIONER'S TITLE VII ACTION.

In bringing his Title VII action, petitioner alleged a discriminatory refusal to promote to Associate Professor with tenure because of his national origin. Since petitioner failed to file a timely charge with the Equal Employment Opportunity Commission, the Circuit Court was correct in affirming the District Court's dismissal under the rule announced in Delaware State College v. Ricks, 449 U.S. 250 (1980).

As noted earlier, in 1981, petitioner received a second term appointment for three years as an Assistant Professor, which appointment was to expire on June 30, 1984. Pursuant to the 12

month notice of non-renewal Bylaw which vested the Dean with the authority to communicate such decisions to the appointee, Dean Lanzoni notified petitioner on June 22, 1983 that his employment as an Assistant Professor would end on June 30, 1984. Petitioner did not file a charge with the EEOC until January 4, 1985.

In New Jersey an aggrieved individual has 300 days from the date of the discriminatory act to file with the EEOC. Mohasco Corp. v. Silver, 447 U.S. 807, 817 (1982); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 751 (3d Cir. 1983), cert. den. 464 U.S. 852 (1983). Under this Court's pronouncement in Delaware State College v. Ricks, supra, the calculation of the limitations period commences at the time the tenure

decision is made and communicated to the affected individual, even though one of the effects of the denial of tenure -- the loss of a teaching position -- does not occur until later. This Court thus rejected the argument that the Delaware State College Board's decision to deny tenure did not become final until the Board denied Ricks' grievance, since the Board had made clear to Ricks far before disposition of his grievance that it had formally and officially denied him tenure. "The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Id. at 261.

These same principles were properly applied to the case at bar. The June 22, 1983 letter from the Dean to petitioner

"officially inform[ed]" him, in accordance with the Bylaws, that his appointment as Assistant Professor was not to be renewed and that his employment would terminate on June 30, 1984. Pursuant to the Bylaws, the final authority to advise of non-renewal reposes with the Dean (or his representative), Art. V, Title B, § 3, and the Bylaws do not require final approval by the Board on non-renewals of term appointments. Art. II, Title B, §§ 1 and 2; Art. II, Title C, §§ 2 and 4; Art. V, Title F, § 4.1; Art. VI, Title B, § 1; Art. VII, Title C, § 8; Art. V, Title B, § 3 (PaB10). Nevertheless, as established by unrebutted affidavit presented to the District Court, all personnel actions taken at NJMS are routinely submitted to the Personnel Committee of the Board for informational

purposes (Da156). As a matter of courtesy, by way of letter on June 22, 1984, the Board's Committee acknowledged the Dean's prior notice of non-renewal (Da156). Petitioner knew full well however, on June 22, 1983, that his appointment as an Assistant Professor would terminate on June 30, 1984 and under Ricks, the statute of limitations began to run from June 22, 1983. Petitioner's filing with the EEOC on January 4, 1985, 18 months later, was therefore untimely and his Title VII action was properly dismissed.

This conclusion, as the District Court and Court of Appeals found, is not altered by petitioner's implementation of the self-submission provision of the Guidelines. That particular clause allows an Assistant Professor, who cannot

secure the support of his departmental chairperson, to submit his credentials directly to FCAP, for review. However, as this Court noted in Ricks, "The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." 449 U.S. at 261. The provision allowing for self-submission is clearly designed to prevent any unfairness at the departmental level from precluding a faculty member's consideration for recommendation for promotion by FCAP. Thus, it acts as a remedy for those faculty members who fail to secure a recommendation at the departmental level and, in the instant case, like Ricks, was "not an opportunity to influence [the

non-renewal] decision before it [was] made." 449 U.S. at 261. Therefore, petitioner's self-submission did not toll the statute of limitations with respect to his failure to be promoted to Associate Professor with tenure. These claims, consequently, were properly dismissed as untimely.

Assuming arguendo, however, that petitioner is correct in claiming that FCAP's rejection following his self-submission renders the EEOC filing timely, the University amply demonstrated, before the District Court, legitimate, non-discriminatory and non-pretextual reasons for its actions. Affirmance of summary judgment by the Circuit Court on those alternative grounds was warranted. Singleton v. Wulff, 428 U.S. 106, 121 (1976).

In response to petitioner's self-submission to FCAP, the Committee unanimously concluded that it could not recommend him for promotion to Associate Professor with tenure because he "ha[d] not presented evidence of the development of an independent, focused research program, evidence of stature in the national academic community, and ha[d] not obtained extramural grant funding ..." (Da9). Following petitioner's appeal under the Guidelines, FCAP unanimously affirmed its earlier decision (Da11).

In an attempt to establish pretext, petitioner pointed to the promotion of Marguerite Stout, Ph.D. As the University presented through affidavit, Dr. Stout was recommended for promotion by her department and chairperson. FCAP

declined to so recommend and rejected her appeal. One year later, again with the support of her department and chairperson, Dr. Stout was recommended for promotion. Again FCAP disagreed. Dr. Stout again appealed and FCAP reversed itself. Subsequently, the Board of Trustees promoted her (Da164-165).

Obviously petitioner differs from Dr. Stout in that he failed to receive the recommendation of his department and chairperson (PaA5). The mere fact that FCAP finally recommended Dr. Stout for promotion and did not recommend petitioner lends no support to the instant claim of discrimination and certainly

provides no justification for issuance of the writ.*

---

* Although petitioner points to several new documents in connection with his Title VII claim (two purported drafts of letters by his chairperson and purported notes), these documents were properly suppressed by the Circuit Court. Petitioner's attempt to ground a motion for relief from judgment upon these same documents was unsuccessful before the District Court (Ra25-26).

Finally, petitioner appears to have abandoned his claim that the Dean's refusal to allow him to self-submit his credentials to FCAP for consideration for promotion to Associate Professor, while an adjunct, was discriminatory. In the event petitioner raises this issue in his reply, respondent wishes to note that the evidence presented to the District and Circuit Courts established that the Dean only transmitted the credentials of those adjuncts who had the support of their chairpersons to FCAP (PaA8-9; PaA24-25). Petitioner had failed to secure his chairperson's recommendation (PaA7). Thus, he was not similarly situated and did not establish differential treatment based on his national origin. Although not addressed by the District Court as a discrete cause of

(Footnote Continued On Following Page)

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By _____
Andrea M. Silkowitz
Assistant Attorney General
Counsel of Record

By _____
Katherine L. Suga
Deputy Attorney General

DATED: August 11, 1988

(Footnote Continued From Previous Page)

action, affirmance of its dismissal by the Circuit Court was entirely proper under Singleton v. Wulff, supra.

APPENDIX

APPENDIX A

Not for Publication

FIKRY L. KHALIL, Plaintiff, vs. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY - NEW JERSEY MEDICAL SCHOOL, Defendant.	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY Civil Action No. 86-1066 Opinion

DEBEVOISE, District Judge:

This case has come before the court on a motion by plaintiff, Fikry Khalil, Ph.D., for relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b). Defendant University of Medicine and Dentistry of New Jersey--New Jersey Medical School (hereafter "University" and "UMDNJ") objects that plaintiff's motion is time-barred with respect

to the judgment dismissing his due process and 42 U.S.C. sec. 1983 claims, and argues that the relief should not be granted with respect to the judgment dismissing the Title VII claim.

This case was originally brought as a Title VII action by plaintiff, who was employed as a professor of medicine by defendant. Plaintiff alleged that he had been discriminated against on account of his national origin, which is Egyptian. The action was dismissed for reasons set forth in a bench opinion of May 26, 1987, because plaintiff had not timely filed a charge with the Equal Employment Opportunity Commission.

Prior to that dismissal, plaintiff had been permitted to amend his complaint to allege an additional claim

under the due process clause of the Fourteenth Amendment and under 42 U.S.C. sec. 1983. In a bench opinion dated April 13, 1987, I granted the defendant's motion for summary judgment on plaintiff's constitutional claim. These determinations were affirmed on appeal, in an order dated January 19, 1988.

Basis for Motion

Several documents form the basis for this motion for relief from judgment: (1) a February 15, 1988 letter from plaintiff's former chairperson, Dr. Gilbert Melnick, which describes several of their conversations from early 1986; (2) a July 30, 1986 letter to plaintiff from Dr. Melnick; (3) a purported draft of a letter from Dr. Melnick to Dean Lanzoni; (4) two

undated, handwritten notes, author(s) unknown; and (5) a purported undated memo from Dean Lanzoni to an unknown recipient; (6) a memo from the Associate Vice President of the school describing the possibility for placing faculty members whose academic progress has been slowed by illness in adjunct positions to permit them to catch up; and (7) a newspaper article describing complaints of racial discrimination at UMDNJ.

Discussion

While ordinarily a district court may not change a judgment which has been affirmed on appeal, relief pursuant to Rule 60(b) may nonetheless be available under certain special circumstances. Rule 60(b) provides that:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Rule further sets forth time limits for bringing motions:

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order,

or proceeding was entered or taken.

The basis which plaintiff invokes for relief from judgment is apparently either (1) or (2). He has offered new evidence, some of which he says could not have been discovered prior to judgment, and some of which he maintains was not presented to the court as a result of mistake or inadvertance on his or his attorney's part.

Sec. 1983 Claim

Since the order dismissing plaintiff's sec. 1983 and due process claims was dated April, 1987, the motion is untimely with respect to this claim. I am without power to extend the time for bringing this type of motion, and appeal does not toll the time for filing such a motion. Transit Casualty Co. v. Security Fund, 441 F.2d 788 (5th

Cir. 1971), cert. denied, 404 U.S. 864 (1971).

Even if plaintiff claims that his attorney's miscalculation brings him under Rule 60(b)(6), the "catch-all" provision, the motion cannot be considered now. On occasion lawsuits involve some attorney error; the extraordinary relief of Rule 60(b)(6) is not available where "a party makes a conscious informed choice of litigation strategy" but "his assessment of the consequences [proves] incorrect." Ackerman v. United States, 340 U.S. 193 (1950). Failure in the context of a motion for summary judgment to submit all facts known which might have been useful to the court is an inadequate basis for setting aside a judgment. See Wright & Miller,

Federal Practice & Procedure sec. 2858 (1973).

Moreover, such a motion must be made within a reasonable time. Plaintiff could have moved to amend judgment based on Dr. Melnick's positive view of his work immediately following dismissal of his claims. Permitting parties to offer new evidence over a year after decisions, when that evidence was available immediately after decision, would needlessly undermine the finality of judgments.

The other documents relevant to the sec. 1983 claim--a purported draft of a letter from Dr. Melnick to Dean Lanzoni and two handwritten notes--can only be characterized as new evidence, which must be submitted within one year of judgment. Thus, it is

too late to consider this evidence now.

Title VII Claim

The Rule 60(b) motion is timely with respect to the dismissal of plaintiff's Title VII claim alleging discrimination on account of national origin, since that claim was not dismissed until May 26, 1987, less than a year prior to the filing of the instant motion. However, a party seeking to reopen an action to introduce new evidence must do more than show that the new evidence is of potential significance. Plisco v. Union Railroad Co., 379 F.2d 15, 16 (3d Cir. 1967), cert. denied, 389 U.S. 1014 (1967). The burden for granting of a new trial, which is the same as that governing relief from judgment on the basis of

newly discovered evidence, United States Fidelity and Guaranty Co. v. Lawrenson, 334 F.2d 464, 465 (4th Cir. 1964), cert. denied, 379 U.S. 869 (1964), is that plaintiff must show that the new evidence would probably change the outcome of the court's prior determination. Giordano v. McCartney, 385 F.2d 154, 155 (3d Cir. 1967). See also Bradley Bank v. Hartford Acc. and Indem. Co., 737 F.2d 657 (7th Cir. 1984) (in action on insurance policy, trial court did not abuse its discretion in denying plaintiff's motion to vacate on the basis of allegedly newly discovered evidence since plaintiff could not demonstrate that the evidence would probably have produced a different result); Trans Mississippi Corp. v.

United States, 494 F.2d 770 (5th Cir. 1974) (motion of taxpayer for relief from judgment on ground of newly discovered evidence was properly overruled on the ground, among others, that the evidence was merely cumulative or impeaching and therefore not "newly discovered").

Here, most of the new evidence offered by plaintiff does not go to the issue which was the reason for the dismissal of that claim--namely, the fact that plaintiff failed to timely file a discrimination complaint with the EEOC. I concluded that based on Delaware State College v. Ricks, 449 U.S. 250 (1980), the date on which the statute of limitations began to run was June 22, 1983, when plaintiff received official notice that his

employment was to be terminated. This was the date on which the decision not to promote him to the tenured position of Assistant Professor was made and communicated to him. I held that:

> . . . the fact that plaintiff submitted his credentials for reconsideration does not serve to extend the limitations period. Although plaintiff seeks to phrase his complaint as alleging three separate discriminatory acts--his termination, the Faculty Committee's refusal in 1984 to recommend his promotion with tenure, and the Dean's refusal in 1985 to submit plaintiff's credentials for reconsideration--they are all part and parcel of the defendant's decision not to promote him.

Bench Opinion at 8. Since I found that the claim was time-barred, I did not reach the merits of the discrimination issue. This decision was affirmed on appeal. Plaintiff seeks to relitigate that issue now, but I have no power to change a legal decision which

was affirmed by the Third Circuit.

None of the documents newly presented by plaintiff substantially undermines my conclusion concerning the statute of limitations issue. Plaintiff was officially notified of the planned termination in June 1983. In connection with the summary judgment motion, plaintiff submitted many documents demonstrating that this decision was not absolutely final, in that subsequent efforts to obtain reconsideration were available to plaintiff, which he purused. It was at that date that the limitation period commenced, not at the time when all administrative remedies had proven futile. Plaintiff's argument that self-presentation was an alternate route to tenure was before the district court in the

original action; plaintiff's Exhibit I submitted with the reply brief in connection with this motion is merely cumulative.

Plaintiff criticizes his attorney's decision to present no evidence from Dr. Melnick before dismissal; the attorney had, according to plaintiff, planned to wait for the discovery period and to obtain an affidavit from Dr. Melnick attesting to his satisfaction with plaintiff's work. Plaintiff suggests that this decision may have been responsible for the dismissal of his case, and apparently seeks to characterize this failure as excusable inadvertence. However, it is clear that this decision was not responsible for the dismissal of the case. The case was dismissed for failure to file

an EEOC complaint within the applicable time limit. This evidence does not change my conclusion on that issue.

Even assuming that it would be possible to reach the merits of plaintiff's discrimination claim, the new evidence does not provide substantial support for plaintiff's allegation that he suffered discrimination because of national origin. Given the procedural context here, plaintiff's burden is higher than it was in the summary judgment motion. Plaintiff must not merely raise a genuine issue of material fact, but must show that but for the failure to offer certain materials, the result would probably have been different. While I did not reach the merits of the case in dealing with the earlier summary judgment motion,

because I concluded that the case was barred by the statute of limitations, I will examine those merits briefly now.

Plaintiff's essential argument that there is discrimination is that he believes he was as qualified as other persons who have been granted promotions to tenured positions. However, there was no evidence presented in this connection beyond his own insistence that he was as qualified as others for promotion and tenure. He did not have the support of the departmental chair for approval, a situation which distinguished his case from those of adjuncts who achieved tenured status. None of the tenured faculty in his department supported his promotion to tenured status, citing

facially legitimate reasons: lack of an independent, focussed research program, lack of a track record in obtaining grants, and lack of national prominence.

Plaintiff has responded to these claims; however, his responses are not so compelling as to make it likely that the result would be different if his claims were addressed on the merits. Plaintiff has not shown evidence of a national reputation or international prominence as a mature scholar; rather, he has shown that even before he obtained professor rank, he was invited to teach in Egypt and Saudi Arabia. He has shown one recent success in obtaining grants, not the kind of long-term record which would ensure an institution making a lifetime

commitment that funding could be counted on to come from elsewhere. As for the department's strong and unanimous reservations concerning his research, no court would presume to override those views in the absence of extremely strong evidence, which is lacking here, that these reservations are unfounded. Merely looking at the quantity of articles and at the fact that plaintiff's name appears first on many of them is insufficient to overcome defendant's proffered justifications, particularly in the absence of any evidence of discrimination on the basis of national origin.

Given these facially legitimate reasons, plaintiff faced a burden confronted with a summary judgment motion of providing evidence that these

motivations were in fact a pretext for a discriminatory hiring. Plaintiff has not met that burden. He has provided no outside testimonials to the quality of his work, and received no support for tenure from within the department. Even where there is considerable evidence of a scholar's excellent qualifications, courts are extremely cautious in interfering with academic personnel decisions. See, e.g., Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984) (for Title VII plaintiff to succeed in denial of tenure case, evidence must show more than denial of tenure in context of disagreement about merits of candidate's research and teaching or needs of department, and absent evidence supporting finding that such disagreements or doubts are

influenced by forbidden considerations, universities are free to establish departmental priorities, set their own required levels of academic potential and achievement, and act on the good-faith judgment of their departmental faculties or reviewing authorities).

Plaintiff has provided no evidence that Dean Lanzoni, Dr. Melnick, or any members of the Faculty Appointment and Promotion Committee which voted on his case were motivated by hostility towards Egyptians. In connection with the instant motion for relief from judgment, he has presented a newspaper article describing allegations of discrimination against blacks in hiring and promotion at the medical school. Apart from the fact that this is not

evidence in admissible form, it applies to a different type of discrimination, the presence of which has no necessary correlation with prejudice against persons of foreign ancestry or against Egyptians in particular.

The new evidence does not fill the vacuum left by plaintiff's failure to provide any evidence of unlawful discrimination. It provides evidence that Melnick was satisfied in late 1986 with plaintiff's work and with his success in obtaining outside funding, and expected to support him for tenure, but casts no light on the ultimate reasons for tenure denial. Plaintiff maintains that Exhibits C-F constitute evidence that this ultimate shift in the department's

evaluation of him was motivated by discriminatory animus. The handwritten notes by unknown sources are hard to evaluate, but they clearly do not create a situation in which it is probable that the outcome would have changed had they been introduced. The fact, if it is one, that Dr. Melnick modified his letter to reflect Dean Lanzoni's doubts concerning the originality of plaintiff's work does not suggest that discrimination was at work. At most, it suggests that Dr. Melnick chose to reconcile a divergence between his view of plaintiff's work and the Dean's view by adopting the latter.

Nor does the notation on Exh. F by someone that the memo from Dean Lanzoni should be kept "well-hidden" confirm the existence of illicit motiva-

tions. It is typical in personnel matters to insist upon confidentiality, and to conceal the source of negative assessments from the people affected. The desire to prevent a situation in which Dr. Lanzoni would appear responsible is not surprising, and does not constitute evidence of national origin discrimination.

Since the earlier introduction of this evidence would not have changed the outcome, it is unnecessary to consider whether there are special circumstances which excuse the failure to produce this evidence before the disposition of the earlier action.

Conclusion

For the reasons described, plaintiff's motion for relief from judgment is denied. Counsel for defendant is

directed to prepare an appropriate form of order.

DICKINSON R. DEBEVOISE, U.S.D.J.

June 28, 1988
DATE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FIKRY L. KHALIL, Plaintiff, v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY - NEW JERSEY MEDICAL SCHOOL, Defendant.	Hon. Dickinson R. Debevoise, U.S.D.J. Civil Action No. 86-1066(DRD) ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

This matter having been opened to the Court by Fikry Khalil, appearing pro se, seeking an Order granting relief from judgment, and Cary Edwards, Attorney General of New Jersey, by Katherine L. Suga, Deputy Attorney General, appearing for defendant, and the Court having considered the Briefs, Appendices and Affidavits submitted

in connection with the motion, together with oral argument; and for the reasons set forth in a written opinion;

IT IS, THEREFORE, this 21st day of July, 1988,

ORDERED that plaintiff's motion for relief from judgment is hereby denied.

DICKINSON R. DEBEVOISE, U.S.D.J.